Supreme Court, U.S.
FILED
AUG 6 1971
SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-2451

GRIMM B. DEPANICIS and JAY R. WETHERILL,

Petitioners,

—v.—

DEPARTMENT OF PUBLIC SAFETY, TOWN OF NUTLEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

MELVIN L. WULF
NICHOLAS B. WARANOFF
American Civil Liberties
Union Foundation
156 Fifth Avenue
New York, New York 10010
Attorneys for Petitioners

STEPHEN M. NAGLER
ACLU of New Jersey
45 Academy Street
Newark, New Jersey 07102
of counsel

INDEX

PAGE

Opinion Below 1

Jurisdiction 2

Questions Presented 2

Ordinance Involved 3

Statement of the Case 3

How the Federal Questions Were Raised 6

Reasons for Granting the Writ 7

Conclusion 18

Appendix—

Opinion of the Superior Court of New Jersey, Appellate Division 1a

Opinion of the New Jersey Civil Service Commission 8a

Authorities Cited

Cases:

Allen v. Murphy (1st Dep't, June 29, 1971), 166 N.Y. L.J. 1 8

Anonymous v. Macy, 398 F.2d 317 (5th Cir. 1968), *cert. denied*, 393 U.S. 1041 (1969) 14

Beck v. Ohio, 379 U.S. 89 (1964) 11

Boyd v. United States, 116 U.S. 616 (1886) 8

Bruns v. Pomerleau, 319 F. Supp. 58 (D.Md. 1970) 14

PAGE

Carter v. McClaughry, 183 U.S. 365 (1902) 17
Carter v. United States, 407 F.2d 1238 (D.C. Cir. 1968) 14-15, 17
Connally v. General Construction Co., 269 U.S. 385 (1926) 16

Dynes v. Hoover, 61 U.S. (20 How.) 65 (1858) 17

Ex parte Mason, 105 U.S. 696 (1882) 17

Gardner v. Broderick, 392 U.S. 273 (1968) 12, 13
Garrity v. New Jersey, 385 U.S. 493 (1967) 12
Gelling v. Texas, 343 U.S. 960 (1952) 17

Jones v. United States, 362 U.S. 257 (1960) 10

Knoll Associates, Inc. v. FTC, 397 F.2d 530 (7th Cir. 1968) 8

Levy v. Corcoran, 389 F.2d 929 (D.C. Cir.), *cert. denied*, 389 U.S. 960 (1967) 17

March, In re, 40 Ill.2d 53, 237 N.E.2d 529 (1968) 8
Martinez, In re, 463 P.2d 734 (Cal. 1970) 9
Matter of Finn's Liquor Shop v. State Liquor Authority, 24 N.Y.2d 671, 249 N.E.2d 440, 301 N.Y.S.2d 584 .. 8-9
McConnell v. Anderson, 316 F. Supp. 809 (D. Minn. 1970) 14
Morrison v. State Bd. of Educ., 1 Cal.3d 214, 82 Cal. Rptr. 175, 461 P.2d 375 (1969) 14

Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969) 14

PAGE

O'Callahan v. Parker, 395 U.S. 258 (1969) 17
Ohio Bell Tel. Co. v. Public Utilities Comm'n, 301 U.S. 292 (1937) 14
One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965) 8

Pickering v. Board of Educ., 391 U.S. 563 (1968) 14
Pizzarello v. United States, 408 F.2d 579 (2d Cir.), *cert. denied*, 396 U.S. 986 (1969) 8
Powell v. Zuckert, 366 F.2d 634 (D.C. Cir. 1966) 8

Reid v. Covert, 354 U.S. 1 (1955) 17

Saylor v. United States, 379 F.2d 894 (Ct. Cl. 1967) 8
Schlegal v. United States, 416 F.2d 1372 (Ct. Cl. 1969), *cert. denied*, 397 U.S. 1037 (1970) 14
Slochower v. Board of Higher Education, 350 U.S. 551 (1956) 12
Smith v. Whitney, 116 U.S. 167 (1886) 17
Swain v. United States, 165 U.S. 553 (1897) 17

Uniformed Sanitation Men's Ass'n v. Commissioner of Sanitation, 392 U.S. 280 (1968) 12
United States v. Sadinsky, 14 USCMA 563, 34 CMR 343 (1964) 17
United States v. Schipani, 435 F.2d 26 (2d Cir. 1970) .. 9
United States v. Vantresca, 380 U.S. 102 (1965) 10
United States ex rel. Lombardino v. Heyd, 318 F. Supp. 648 (E.D. La. 1970), *aff'd per curiam*, No. 30871 (5th Cir. 1971), *petition for cert. filed*, 39 U.S. L.W. 3522 (U.S. May 18, 1971) (No. 1721) 9
United States ex rel. Sperling v. Fitzpatrick, 426 F.2d 1161 (2d Cir. 1970) 9

PAGE

Constitutional Provisions:

United States Constitution
Fourth Amendment 8
Fifth Amendment 2
Fourteenth Amendment 2, 14, 16

Federal Statutes:

5 U.S.C. §7701 8
10 U.S.C. §933 16
10 U.S.C. §934 ..... 16, 17
28 U.S.C. §1257(3) 2

State Statutes:

N.J.S.A. §33:1-1(w) (Supp. 1971) 10
N.J.S.A. §33:1-77 (Supp. 1971) 10
N.J.S.A. §33:1-81 (Supp. 1971) 10
New York City Charter, section 1123 12
Nutley Town Ordinance No. 357, article 4, section 3 3
Police Department, City of New York, Rules and Procedures, ch. 2 (General Regulations), paragraph 37.1 (as amended, October 18, 1968) 16

Other Authorities:

Lindsay, The City 176 (1970) 16
Wiener, Are the General Military Articles Unconstitutionally Vague? 54 A.B.A.J. 357 (1968) 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. .....

GRIMM B. DEPANICIS and JAY R. WETHERILL,

Petitioners,

—v.—

DEPARTMENT OF PUBLIC SAFETY, TOWN OF NUTLEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

The petitioners Grimm B. DePanicis and Jay R. Wetherill respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Superior Court of New Jersey, Appellate Division, entered in this proceeding on December 4, 1970.

Opinion Below

The opinion of the Superior Court of New Jersey, Appellate Division is not yet reported. A copy is set out in the Appendix, *infra*, page 1a.

Jurisdiction

The opinion of the Superior Court of New Jersey, Appellate Division, was rendered on December 4, 1970. A timely petition for certification filed in the Supreme Court of New Jersey was denied on March 15, 1971. On June 9, 1971, Mr. Justice Brennan granted an extension of time within which to file this petition for certiorari to and including July 13, 1971. The jurisdiction of this court rests on 28 U.S.C. section 1257(3).

Questions Presented

1. Whether illegally seized evidence is admissible in an administrative proceeding to discharge a police officer?

2. Whether the discharge of a police officer for refusing to obey an order to file a written report of an incident in which he was personally involved while off-duty denies him his privilege against self-incrimination protected by the Fifth and Fourteenth Amendments?

3. Whether discharge of a police officer because of off-duty, non-criminal conduct at a private party, without any showing of any adverse effect upon his on-the-job performance, violates the Due Process Clause of the Fourteenth Amendment?

4. Whether discharge of a police officer under departmental regulations proscribing "conduct unbecoming an officer" and "conduct subversive of the good order and discipline of the force" is a denial of due process of law, in violation of the Fourteenth Amendment, because the regulations are unconstitutionally vague?

Ordinance Involved

Nutley Town Ordinance number 357, article 4, section 3:

> The following are charges to be heard before the Director of the Department of Public Safety . . .
>
> * * * * *
>
> (16) Conduct unbecoming an officer and a gentleman.
>
> (17) Conduct subversive of good order and the discipline of the force.
>
> * * * * *

Statement of the Case

Petitioners, two former police officers of the Town of Nutley, New Jersey, file this petition for a writ of certiorari to review their dismissal from the Town police force. This removal proceeding was instituted because of certain private, off-duty, non-criminal conduct of the policemen in the apartment of one of them, evidence of which was obtained by an illegal search and seizure.

On the morning of March 7, 1969, the Nutley Police Department received an anonymous telephone call stating that there would be a "wild beer party" at petitioner Wetherill's apartment that night (Tr. 6-7, 61, 62).[1] Wetherill was at that time a member of the police force. Wetherill's apart-

[1] "Tr." denotes citations to the transcript of the hearing held before the Civil Service Commission.

ment was placed under surveillance, and several persons, including apparent minors, were observed entering Wetherill's apartment that evening between 8 p.m. and about 9:15 p.m. It was also observed that packages were being brought into the apartment, including some that appeared to be cases of beer (Tr. 45, 46, 51). At about 10 p.m., the police sought entry (Tr. 48, 53). Wetherill answered the door, but asked the police not to enter his apartment (Tr. 10, 37, 53). Despite the absence of any warrant, the police nonetheless entered (Tr. 10, 53). Many of the guests were found to be minors. A large number of empty beer cans and liquor bottles were found, as well as others which were full, or partially full. There was no evidence, however, as to how much liquor and beer were consumed at that party, as opposed to on earlier occasions. Petitioner DePanicis was found to be present at the party.

Each petitioner was ordered by the Chief of Police to file a written report of the incident, no later than the following day (Tr. 64-65). Petitioner Wetherill did so (Tr. 65), but petitioner DePanicis asserted his privilege against self-incrimination (Tr. 66, 74).

Both petitioners were subsequently charged with conduct unbecoming an officer, conduct subversive of the good order and discipline of the force, and other violations of departmental regulations encompassed in these two charges. In addition, petitioner DePanicis was charged with wilful disobedience of the order to file a report of the incident. Neither petitioner was ever charged with violation of any criminal statute.

Following a hearing, the Department of Public Safety, Town of Nutley, ordered their dismissal from the police force. Petitioners appealed to the New Jersey Civil Service Commission which, after a *de novo* hearing, affirmed their removal on December 29, 1969, finding them guilty of all charges. The Commission concluded:

> [T]heir right of association does not free them of the obligation to conduct themselves in a proper manner, nor are they free to participate in an activity, particularly, one involving minors where alcoholic beverages are made readily available to these young persons.

The Superior Court, Appellate Division, affirmed the removal in an opinion dated December 4, 1970. It summarily rejected petitioners' constitutional claims, and found the action of the Commission supported by substantial evidence.

On March 15, 1971, the Supreme Court of New Jersey denied a petition for certification.

How the Federal Questions Were Raised

Question 1 was raised before the Civil Service Commission the first time an attempt was made to introduce evidence seized from petitioner Wetherill's apartment (Tr. 11-12). The Commission did not pass upon the issue. The question was presented to the Superior Court, Appellate Division, in the briefs. Brief for DePanicis at 5-14; Brief for Wetherill at 4-15. The Superior Court, Appellate Division ruled that the evidence had been lawfully seized. App., *infra*, p. 5a. The question was presented to the Supreme Court of New Jersey, in the Petition for Certification, filed in behalf of both DePanicis and Wetherill, at 9-15.

Question 2 was raised before the Commission (Tr. 76-78). The Commission ruled that DePanicis could not properly refuse to file the report by relying on his privilege against self-incrimination (Tr. 78). The question was presented to the Superior Court, Appellate Division, in the brief filed in behalf of DePanicis, at 18-21. The court did not pass upon the issue. The question was presented to the Supreme Court of New Jersey in the Petition for Certification, at 19-20.

Question 3 was presented to the Superior Court, Appellate Division, in the briefs filed on behalf of both DePanicis and Wetherill, where it was argued that the evidence, even if admissible, did not warrant dismissal of the officers. Brief for DePanicis at 22-24; Brief for Wetherill at 16-23. The court did not pass upon the question. The question was presented to the Supreme Court of New Jersey in the Petition for Certification, where it was argued that both police officers were off-duty and "that there

is nothing about the activities alleged that would constitute 'conduct unbecoming an officer' or 'conduct subversive of good order and the discipline of the force.'" Petition at 17.

Question 4 was presented to the Superior Court, Appellate Division, by arguing that the dismissals were arbitrary and capricious. The court did not pass upon the issue of vagueness. The vagueness question was presented to the Supreme Court of New Jersey in the Petition for Certification, where it was argued that "'conduct unbecoming an officer' and 'conduct subversive of good order and the discipline of the force' are vague standards that do not really give adequate notice of what may and may not be done by officers in their private lives." Petition at 18.

Reasons for Granting the Writ

I.

Certiorari should be granted as to the first question presented to decide an important question of federal law which has not been, but should be, settled by this Court: whether illegally seized evidence is admissible in an employee discharge proceeding. The decisions below, which relied on evidence which had been illegally seized, are contrary in principle to prior decisions of this Court, and conflict with decisions of two federal courts of appeal and one state appellate court, holding that illegally seized evidence is inadmissible in an employee discharge proceeding. In addition, certiorari should be granted because the decisions below manifest gross disregard for prior decisions of this Court requiring that a search of a private dwelling be con-

ducted pursuant to a search warrant, except in special circumstances not present here.

Since all of the evidence in this case was unlawfully seized, it should have been held inadmissible even though the proceeding was not criminal in nature. Indeed, the first time this Court suggested that the guarantee of the Fourth Amendment was to be enforced by excluding evidence obtained in violation thereof was in a non-criminal forfeiture proceeding. *Boyd* v. *United States,* 116 U.S. 616 (1886). More recently, in another forfeiture proceeding, this Court reaffirmed the applicability of the exclusionary rule to non-criminal proceedings. *One 1958 Plymouth Sedan* v. *Pennsylvania,* 380 U.S. 693 (1965).

Two lower federal courts and a state appellate court have specifically held that illegally seized evidence cannot be admitted in an employee discharge proceeding. *Powell* v. *Zuckert,* 366 F.2d 634 (D.C. Cir. 1966); *Saylor* v. *United States,* 374 F.2d 894 (Ct. Cl. 1967);[2] *Allen* v. *Murphy* (1st Dep't, June 29, 1971), in 166 N.Y.L.J. No. 1, at 1, col. 4. Furthermore, the exclusionary rule has been applied as well in other non-criminal proceedings. *Pizzarello* v. *United States,* 408 F.2d 579, 585-86 (2d Cir.), *cert. denied,* 396 U.S. 986 (1969) (tax assessment proceeding); *Knoll Associates, Inc.* v. *FTC,* 397 F.2d 530 (7th Cir. 1968) (administrative proceeding under the Clayton Act); *In re March,* 40 Ill.2d 53, 237 N.E.2d 529 (1968) (juvenile delinquency proceeding); *Matter of Finn's Liquor Shop* v.

[2] Although both the *Powell* and *Saylor* courts were construing the statute governing hearings before the Federal Civil Service Commission (then 5 U.S.C. §863, now 5 U.S.C. §7701), it is clear from the opinions that the statute itself played no significant role in the decision.

State Liquor Authority, 24 N.Y.2d 671, 249 N.E.2d 440, 301 N.Y.S.2d 584 (administrative proceeding). *Contra, United States* v. *Schipani,* 435 F.2d 26 (2d Cir. 1970) (sentencing proceeding); *United States ex rel. Sperling* v. *Fitzpatrick,* 426 F.2d 1161 (2d Cir. 1970) (parole revocation hearing); *United States ex rel. Lombardino* v. *Heyd,* 318 F.Supp. 648 (E.D. La. 1970), *aff'd per curiam,* No. 30871 (5th Cir. 1971), *petition for cert. filed,* 39 U.S.L.W. 3522 (U.S. May 18, 1971) (No. 1721) (probation revocation proceeding); *In re Martinez,* 463 P.2d 734 (Cal. 1970) (parole revocation hearing).

The court below did not, it should be noted, reach the question of whether illegally seized evidence is admissible in an employee discharge proceeding, since it held the evidence was lawfully obtained. But the court was in error in summarily concluding that the search was lawful. The court's total analysis was contained in the following single sentence: "We are satisfied from our review of the record that the actions of the police, in the circumstances, were reasonable and that the challenged evidence was properly received in evidence by the Commission." No citation of any authorities accompanied this statement. Yet uncontradicted testimony indicated that the police officers who made the entry did not seek to obtain a search warrant "Because there was no physical evidence to get a Search Warrant. . . . [W]e felt we didn't have evidence [prior to ringing Wetherill's doorbell] to go into a man's home. There was no criminal act being committed" (Tr. 33-34). Surely the conversation with Wetherill at the door—the only other possible basis for the entry—did not furnish

sufficient justification for the entry. Wetherill reportedly told the investigating officers that there were juveniles drinking and that the party had "gotten out of hand" (Tr. 10-15)—whatever that means. This could not support even a suspicion that any crime was being committed inside.[3] Thus the police had no right to enter Wetherill's apartment.[4]

Moreover, even if it can be said on these facts that there was probable cause to believe that some unspecified crime was being committed, the search was unlawful because no search warrant had been obtained. There is a preference that searches be made pursuant to warrants. *United States* v. *Vantresca,* 380 U.S. 102, 106-07 (1965); *Jones* v. *United States,* 362 U.S. 257, 270 (1960). Warrants are required unless the search fits one of the exceptions to this rule, viz., exigent circumstances, a search incident to lawful arrest, or hot pursuit.

There is no indication either in the opinion of the court below or in the opinion of the Civil Service Commission as to which exception was the basis for their decisions. Counsel for the respondent Town took the position below

---

[3] No New Jersey statute prohibits minors from being given, or from consuming, alcoholic beverages in a private home. The only prohibitions are against sales to minors, N.J.S.A. §33:1-77 (Supp. 1971)—the definition of sale excluding gratuitous transfers, N.J. S.A. §33:1-1(w) (Supp. 1971)—and against consumption by minors in a retail establishment. N.J.S.A. §33:1-81 (Supp. 1971).

[4] Both the Commission (App., *infra,* p. 10a) and the court below (App., *infra,* p. 3a) agreed that there was no consent to the entry.

that the search came under the "exigent circumstances" exception. Brief for the Respondent in the Superior Court, Appellate Division, at 23-25. Yet a review of the record indicates that the police had sufficient time to obtain a warrant, assuming the facts support any finding of probable cause. By 8:30 p.m. the anonymous tip had been corroborated—a know minor was observed carrying what appeared to be a case of beer into the apartment (Tr. 45, 51). Ninety minutes elapsed before the police sought to enter the apartment (Tr. 48, 53). Although ninety minutes might not be sufficient time in every case to obtain a warrant, here there was uncontradicted evidence that the police knew a local magistrate lived only a block and a half away from police headquarters (Tr. 32), and a judge of the Superior Court lived a quarter-mile from police headquarters (Tr. 32-33). Thus, there was no exigency, particularly since it could be assumed that the party would continue well into the evening.

Nor can the search be justified as incident to arrest. For one thing, it is not clear from the record whether anyone was actually arrested, or whether petitioner's guests merely accompanied the police to headquarters voluntarily to clear up the matter (Tr. 25, 165-66). If there were arrests, they were illegal because there was no probable cause shown. And an unlawful arrest invalidates a search made incident thereto. *Beck* v. *Ohio*, 379 U.S. 89 (1964).

Certiorari should therefore be granted to enable the Court to decide this important question of federal law for the first time.

II.

Certiorari should be granted as to the second question presented, which applies only to petitioner DePanicis, because the court below has decided a federal question in conflict with applicable decisions of this Court that "policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional right." *Garrity* v. *New Jersey*, 385 U.S. 493, 500 (1967).

One of the three principal charges upon which DePanicis' discharge was based was his refusal to obey the police chief's order to file a written report of the incident involved here. At that time, DePanicis, on advice of counsel, invoked his privilege against self-incrimination. The effect of the police chief's order was to require DePanicis to waive this privilege. He was, therefore, fired for refusing to waive. Moreover, the incident which was to be the subject of the report took place while DePanicis was off-duty, and did not concern the performance of his duties. His discharge thus violates the rule laid down in *Gardner* v. *Broderick*, 392 U.S. 273 (1968) and *Uniformed Sanitation Men's Ass'n* v. *Commissioner of Sanitation*, 392 U.S. 280 (1968), that public employees may not be dismissed from their jobs for refusing to waive their privilege against self-incrimination. In those cases, policemen and sanitation men were discharged for refusing to sign "waivers of immunity." This Court held such discharges unconstitutional. *Cf. Slochower* v. *Board of Higher Education*, 350 U.S. 551 (1956). The situation involved here is essentially the same. The police chief's order, backed up by departmental regulations requiring that orders be obeyed, had the same unconstitutional coercive effect as section 1123 of the New

York City Charter, declared unconstitutional in *Gardner* v. *Broderick, supra.* Thus the decision below was erroneous.

Moreover, the question is substantial because the decisions below display callous disregard for, or gross misunderstanding of, these precedents. Although counsel for DePanicis pressed this issue both before the Commission and in the Superior Court, Appellate Division, neither opinion accords even cursory discussion to the question.

III.

Certiorari should be granted as to the third question presented because the court below has decided an important question of federal law which has not been, but should be, settled by this Court: the extent to which private, non-criminal, off-duty conduct of a policeman, not shown to affect his performance of his job, can be the basis of a dismissal from employment.

It is uncontradicted that both policemen were off-duty, and at a private party. It is not seriously disputed that no criminal conduct was involved.[5] There is no evidence in the record of any connection between petitioner Wetherill having hosted a party at which minors consumed alcoholic beverages, and his performance as a police officer. Nor is there evidence of any connection between petitioner DePanicis' mere presence at the party and his performance

[5] Respondent suggested below that there were reasonable grounds to believe petitioners were "violating the law," but the particular law believed to have been violated is not specified. Brief for the Respondent in the Superior Court, Appellate Division, at 23. More important, there is no assertion that either petitioner *actually violated* any law.

as a policeman. All we have is the bald conclusion of the Civil Service Commission: "The action of both Officers leads to the inescapable conclusion that the action of the appointing authority in dismissing both Officers was, and is in the best interest of the community, the Police Department of the Town of Nutley, and appellants [i.e., petitioners here]." Discharge on such a basis is a violation of the Due Process Clause of the Fourteenth Amendment, which furnishes "protection of the individual against arbitrary action." *Ohio Bell Tel. Co.* v. *Public Utilities Comm'n,* 301 U.S. 292, 302 (1937).

The scope of the government's power to fire an employee for off-duty, private conduct is ill-defined. Where freedom of speech is not involved,[6] the question has usually arisen in connection with the rights of homosexuals. In cases involving homosexual acts—where there often is the additional factor (not present here) of violation of the penal laws—courts have differed as to whether a nexus to job performance must be shown. Compare *Norton* v. *Macy,* 417 F.2d 1161 (D.C. Cir. 1969) (connection must be shown); *McConnell* v. *Anderson,* 316 F. Supp. 809 (D.Minn. 1970), (same); *Morrison* v. *State Bd. of Educ.,* 1 Cal. 3d 214, 82 Cal. Rptr. 175, 461 P.2d 375 (1969) (same—no illegal acts involved) with *Anonymous* v. *Macy,* 398 F.2d 317 (5th Cir. 1968), *cert. denied,* 393 U.S. 1041 (1969) (no connection need be shown); *Schlegal* v. *United States,* 416 F.2d 1372 (Ct. Cl. 1969), *cert. denied,* 397 U.S. 1037 (1970) (same). Furthermore, it has been held that a nexus must be shown to support a refusal to hire a nudist as a policeman. *Bruns* v. *Pomerleau,* 319 F. Supp. 58 (D.Md. 1970). *Cf. Carter* v.

---

[6] *Compare, e.g., Pickering* v. *Board of Educ.,* 391 U.S. 563 (1968).

United States, 407 F.2d 1238 (D.C. Cir. 1968), in which the court, applying a statute prohibiting discharge except for "cause," reversed and remanded for trial a decision granting summary judgment against a discharged FBI clerk, a bachelor, who had engaged in heterosexual activity, but not intercourse, with an unmarried woman.

In the present case, the conduct for which both petitioners were discharged, unlike homosexuality, is clearly within the bounds of commonly-accepted conduct and did not violate any penal laws. Therefore, it is particularly important that some adverse effect upon job performance be proven; otherwise, officials will be able to discharge anyone they please merely by pointing to some deviation, however slight, from undefined social standards and concluding *ipso facto* that the individual involved is unfit for government employment. In view of the large number of employees of the federal and state governments, it is important that this Court provide some guidelines as to the permitted range of private conduct of such individuals.

IV.

This Court should grant certiorari as to the fourth question presented because the ordinance which both petitioners were found to have violated raises an important constitutional question affecting the large number of persons subject to similar prohibitions—a question which has not been, but should be, settled by this Court. The challenged ordinance prohibits (1) conduct unbecoming an officer and (2) conduct subversive to the good order and discipline of the force. Such rules are not unique to the Nutley, N. J., police force. For example, the 32,000 mem-

bers of the New York City police department[7] are bound by a similar regulation.[8] In addition, two punitive articles of the Uniform Code of Military Justice—article 133 and article 134, 10 U.S.C. §§933, 934—are virtually identical.[9]

The Nutley ordinance is challenged here on the ground that it is unconstitutionally vague, in violation of the Due Process Clause of the Fourteenth Amendment. A "statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926).

This Court has never authoritatively ruled on whether legislative standards such as those at issue here are sufficiently definite. Doubts have often been expressed about whether the similarly-worded articles of the Uniform Code of Military Justice pass constitutional muster. "Article

---

[7] J. Lindsay, The City 176 (1970).

[8] Police Department, City of New York, Rules and Procedures, ch. 2 (General Regulations), paragraph 37.1 (as amended, October 18, 1968): "Conduct, disorder, or neglect prejudicial to good order, efficiency or discipline, whether or not specifically mentioned in the Rules and Procedures, and including cowardice or making a false official statement, is prohibited."

[9] Article 133 provides: "Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct." Article 134 provides in relevant part: "Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces . . . shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court."

134 . . . punishes as a crime 'all disorders and neglects to the prejudice of good order and discipline in the armed forces.' Does this satisfy the standards of vagueness as developed by the civil courts?" *O'Callahan* v. *Parker,* 395 U.S. 258, 265-66 (1969). Article 134 was also cited by this Court to support the proposition that "Military law is, in many respects, harsh law which is frequently cast in very sweeping and vague terms." *Reid* v. *Covert,* 354 U.S. 1, 38 & n. 69 (1955). "A simple reading of . . . [Articles 133 and 134] shows that they are quite broad." *Levy* v. *Corcoran,* 389 F.2d 929, 932 (D.C. Cir.) (Bazelon, C.J., dissenting), *cert. denied,* 389 U.S. 960 (1967). *But see United States* v. *Sadinsky,* 14 USCMA 563, 34 CMR 343 (1964); Wiener, Are the General Military Articles Unconstitutionally Vague? 54 A.B.A.J. 357 (1968).[10]

In *Carter* v. *United States,* 407 F.2d 1238 (D.C. Cir. 1968), an FBI rule prohibiting "conduct unbecoming an employee of this Bureau" was held to raise a triable question of fact as to whether a reasonable man would know that heterosexual necking and petting were proscribed under the regulation. *Id.* at 1246.

In *Gelling* v. *Texas,* 343 U.S. 960 (1952) (mem.), this Court invalidated as unconstitutionally vague an ordinance which authorized censorship of motion pictures "of such character as to be prejudicial to the best interests of the people of said City."

---

[10] In several older cases decided prior to the maturity of the void-for-vagueness doctrine, this Court upheld convictions under predecessors of Article 134. *E.g., Carter* v. *McClaughry,* 183 U.S. 365 (1902); *Swaim* v. *United States,* 165 U.S. 553 (1897); *Smith* v. *Whitney,* 116 U.S. 167 (1886); *Ex parte Mason,* 105 U.S. 696 (1882); *Dynes* v. *Hoover,* 61 U.S. (20 How.) 65 (1858).

Certiorari should therefore be granted as to this issue to enable this Court to resolve the constitutional doubts as to whether the challenged ordinance and those of its ilk are impermissibly vague.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

MELVIN L. WULF
NICHOLAS B. WARANOFF
American Civil Liberties
Union Foundation
156 Fifth Avenue
New York, New York 10010
Attorneys for Petitioners

STEPHEN M. NAGLER
ACLU of New Jersey
45 Academy Street
Newark, New Jersey 07102
of counsel

July 13, 1971

APPENDIX

Opinion of the Superior Court of New Jersey, Appellate Division

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

A-1006-69

A-1007-69

DEPARTMENT OF PUBLIC SAFETY, TOWN OF NUTLEY,

Plaintiff-Respondent,

—v.—

GRIMM B. DE PANICIS,

Defendant-Appellant.

DEPARTMENT OF PUBLIC SAFETY, TOWN OF NUTLEY,

Plaintiff-Respondent,

—v.—

JAY R. WETHERILL,

Defendant-Appellant.

Argued October 27, 1970—Decided Dec 4 '70

Before Judges Lewis, Matthews and Mintz.

On appeal from the Civil Service Commission.

Mr. Charles C. Carella argued the cause for appellants (Messrs. Citrino, Carella & Balsam, attorneys; Mr. William S. Bonanno, on the brief).

Mr. Anthony T. Drollas argued the cause for respondent.

Mr. George F. Kugler, Jr., Attorney General of New Jersey, attorney for respondent New Jersey State Civil Service Commission (Miss Colette A. Coolbaugh, Deputy Attorney General, of counsel), filed Statements in Lieu of Briefs.

PER CURIAM.

These companion cases were jointly tried before the Civil Service Commission and, although not formally consolidated, were argued together on appeal.

Defendants Grimm DePanicis and Jay Wetherill, police officers of the Town of Nutley, individually appealed from an order of the Civil Service Commission, entered December 29, 1969, affirming orders of the Department of Public Safety of the Town of Nutley removing them from office on specified charges. Defendants were found guilty of: (1) conduct unbecoming an officer; (2) conduct subversive of the good order and discipline of the force, and (3) other departmental regulation violations encompassed in those charges. Defendant DePanicis was also found guilty of willful disobedience of an order of his superior to file a report of the incident under review within a stated time.

The record reveals that at 11 A.M. March 7, 1969, Sergeant Dietz of the local police department received an anonymous telephone call that "a wild beer party" involving teen-agers would take place that evening at defendant Wetherill's apartment. The premises were placed under

surveillance and between 8 and 9 P.M. that night the surveillant, Patrolman Guerino, observed 21 girls and 12 boys enter the apartment. One of the boys was seen carrying a case labelled "Millers." About 8:30 P.M. Captain Casciano, who passed the apartment in a patrol car, noticed an individual with what appeared to be a case of beer. At approximately 10 P.M., two of the several officers dispatched to the property approached the front door, rang the "bell" of the apartment and Wetherill "came down and opened the door." Upon inquiry by the officers as to whether any juveniles were drinking upstairs, Wetherill admitted "that there were and the party had gotten out-of-hand," but he requested the officers not to enter.

Sergeant Dietz testified that "Under those circumstances, I went into the apartment. I felt it was my duty to enter the apartment at that time and I went upstairs." He further testified that on reaching the landing, he was offered a drink and that when Captain Casciano, following him, was observed someone yelled "cops," and there ensued "a very large confusion." There were numerous persons drinking or holding containers of alcoholic beverages. A female teen-ager was found hiding in a closet and about eight of the guests, including defendant DePanicis were discovered in the unlighted attic of the apartment.

One of the signs located near the entrance to the apartment recited these "Rules":

1. *No* Shoes in Living Room
2. *No Grass* in House
3. *No* Booze leaves this house
4. Once you leave this house, You Stay Out
5. ALL Guests will announce Departures

6. Everyone WILL enjoy themselves

7. House Reserves Right To Evict or Bar Anyone it Damn Well Pleases.

   Any Disputes or Arugements [*sic*] Taken to Bouncer Winfield

There was testimony by witnesses for defendants, guests at the party, to the effect that none of the guests over 21 years of age were intoxicated and none of the guests under 21 years of age were drinking alcoholic beverages.

The inventory of the alcoholic beverages found in the apartment by the police included 120 empty and 20 full beer cans, 5 empty and 4 partially consumed bottles of whiskey, together with wine and other alcoholic beverages. Of the 33 guests who were present, 28 were minors—21 of whom were females and 7 were males. All of the female guests were under 21 years of age.

That same night Police Chief Buel requested DePanicis and Wetherill to prepare a full report of the incident and to submit it not later than 4 P.M. the following day. Wetherill promptly made his report which included a statement that he had hosted a surprise birthday party for a friend (his 18-year-old girlfriend), that the police arrived and requested entrance to check the apartment and that he "let the police in." On the advice of his attorney, who was concerned with protecting his client's constitutional rights, DePanicis did not make a timely report. He did, however, finally file a report on his own initiative. The report stated that he went to Wetherill's apartment because he "had an appointment with a girl to discuss a personal problem," that he was not engaged in the birthday party

and "was unaware of any kids under 21 years of age having alcoholic beverages in their possession."

Neither Wetherill nor DePanicis testified. Their counsel indicated that they were not doing so because they were fearful that subsequent criminal proceedings might be brought against them. However, they were advised that they could have requested a postponement of the hearing until after the disposition of any criminal charges.

The Commissioner specifically found that "it is inescapable that these teenagers had available to them or expected to and, in fact, did participate in the consumption of the beer and whiskey" and that both patrolmen DePanicis and Wetherill were active participants at the party. The Commissioner concluded that the actions of the appointing authority in dismissing both officers was and is in the best interests of the community, the Police Department of the Town of Nutley and the officers.

Defendants here seek a reversal of the Commission's decision without remand, together with reimbursement for back pay. They contend that (1) the Commissioner erred in admitting, over objections by defense counsel, illegally seized evidence and testimony relating to it, and (2) the decision of the Commission was inconsistent with the testimony and that its findings were not supported by substantial evidence.

We are satisfied from our review of the record that the actions of the police, in the circumstances, were reasonable and that the challenged evidence was properly received in evidence by the Commission. For purposes of this opinion we need not reach the issue as to whether evidence which is the product of an illegal search and seizure is admissible in a civil action.

The past records of the respective defendants, which reveal numerous infractions of departmental regulations while serving as police officers, were factors which the Commission had a right to take into consideration in fixing the penalties imposed. See *Moorestown Tp.* v. *Armstrong,* 89 *N.J. Super.* 560 (App. Div. 1965), certif. den. 47 *N.J.* 80 (1966); *West New York* v. *Bock,* 71 *N.J. Super.* 143, 152 (App. Div. 1961), aff'd 38 *N.J.* 500 (1962).

It is axiomatic that a reviewing court will not upset a decision of the Civil Service Commission in the absence of an affirmative showing that it was arbitrary, capricious or unreasonable, or not supported by evidence. *Greco* v. *Smith,* 40 *N.J. Super.* 182, 184-85 (App. Div. 1956). This rule of review is at all times to be given "sympathetic sweep." *East Paterson* v. *Civil Service Dept. of N.J.,* 47 *N.J. Super.* 55, 65 (App. Div. 1957). Additionally, there exists a presumption that an order of the Civil Service Commission, with respect to penalties imposed on an employee, is a reasonable and valid exercise of its legislatively conferred authority and the burden of establishing the contrary is upon him who asserts it. *Id.* However, "[t]he now generally accepted gauge of administrative factual finality is whether the factual findings are supported by *substantial* evidence." *Elizabeth Lodge No. 289, etc.* v. *Legalized Games, etc.,* 67 *N.J. Super.* 239, 246 (App. Div. 1961) (emphasis added).

As this court stated in *Newark* v. *Massey,* 93 *N.J. Super.* 317 (App. Div. 1967):

> In disciplinary actions, when an officer has been adjudged guilty of misconduct, the penalty, determined by the department head "upon whom, in the final analysis, rests the responsibility of sedulously maintaining departmental morale and discipline and adequate

> standards of service," should not be disturbed unless the discipline visited upon the convicted offender is so "utterly disproportionate to the offense" as to amount to a clear abuse of discretion. [At 324-25]

We find substantial evidence in the instant record to support the determination of the Commission and conclude that, considering the totality of the facts and circumstances, the disciplinary penalty visited upon defendants was not an abuse of discretion.

Affirmed.

Opinion of the New Jersey Civil Service Commission

December 29, 1969

DECISION ON APPEALS OF GRIMM B. DEPANICIS AND JAY R. WETHERILL

The appeals of Grimm B. DePanicis and Jay R. Wetherill, patrolmen, Police Department, Town of Nutley, on their removal effective March 22, 1969, on specified charges, were regularly brought on for hearing on September 29, 1969, at Newark, New Jersey, before Honorable James H. Dowden of the Civil Service Commission, who rendered his decision on December 29, 1969.

APPEARANCES: ANTHONY T. DROLLAS, Esq., Attorney for the Town of Nutley

ROBERT J. CITRINO, Esq., Attorney for appellants DePanicis and Wetherill

The following witnesses testified on behalf of the Respondent, the Town of Nutley:

Sergeant William Dietz
Detective Edward Guerino
Captain Donald Casciano
Chief Francis T. Buel

The appellants, Grimm B. DePanicis and Jay R. Wetherill, called the following witnesses:

Kathleen E. Jones
Allison Stewart
Denise Marie Buck
Robert Postlewaite
Alan Nyitray
Anthony Barino
Ronald Wilke

The following exhibits were received in evidence:

M-1	Sign—Patrolman Wetherill's door
M-2	Sign—Patrolman Wetherill's apartment
M-3	List of names—party attendance
M-4	Inventory of items
M-5	Photograph—items from apartment
M-6	Photograph—items from apartment
M-7	Cigarette Paper Packages
M-8	Cigarette Paper Packages
M-9	Cigarette Paper Packages
M-10	Report of Patrolman Wetherill
M-11	Report of Patrolman DePanicis
M-12	Patrolman DePanicis' Personnel Record
M-13	Patrolman Wetherill's Personnel File
M-14	Ordinance
A-1	Diagram

Discussion

In this matter Grimm B. DePanicis and Jay R. Wetherill, both Patrolman in the Police Department of the Town of Nutley, are appealing from their removal from the force as a result of certain charges which were lodged against them because of an incident that occurred on March 7, 1969. Since the charges against both emanate from the same incident, they will be considered together although separate Findings will be made as to each appellant.

Jay R. Wetherill is charged with conduct unbecoming an officer; conduct subversive of good order and discipline of the force and certain other departmental regulation violations which are tantamount to the same basic charges as recited above.

Grimm B. DePanicis is charged with conduct unbecoming an officer; conduct subversive of good order and the discipline of the force; wilfull disobedience of orders and certain other departmental regulation violations which are encompassed in the above complaints.

An anonymous call was received at the Nutley Police Department early on the day of March 7, 1969, and the department was advised that Patrolman Wetherill was about to host a party at which he would serve alcoholic beverages to his guests, including some teenagers. In light of this information, a patrolman was assigned to make a surveillance of the house during the evening of March 7 and about 9:15 P.M., he reported to his superiors that he had observed a group of teenage boys and girls entering Officer Wetherill's apartment which he shared with another bachelor. Some of the guests were observed carrying packages into the apartment and these packages appeared to be cases of beer. Thereupon, Captain Casciano, in charge of that tour of duty, together with certain officers, visited the premises and rang the bell. The door was opened by Officer Wetherill, who, according to the appointing authority's witnesses, admitted that there were juveniles at the apartment who were drinking and that the party had "gotten out of hand". However, the host requested that the police not enter the premises. The Captain made a determination that it was his obligation, in light of the admission and the prior observations of his investigator, to make further inquiry.

Two signs were posted, both of which, were entered into evidence. The first was located just outside the apartment and read:

"NO PARTY!"

The second sign, which was located at the top of the stairs read:

RULES

1. *No* Shoes in Living Room
2. *No Grass* in House
3. *No* Booze leaves this house
4. Once you leave this house, You Stay Out
5. ALL Guests will announce Departures
6. Everyone WILL enjoy themselves
7. House Reserves Right To Evict or Bar Anyone it Damn Well Pleases.

Any Disputes or Arugements Taken to Bouncer Winfield

Thank you

Jay & Leon

Prop. Since
Last Month

When the police team entered the apartment by mounting the stairs, one witness policeman testified that he observed numerous persons holding alcoholic beverage drinks in their hands. At that point somebody yelled "cops" and there was large confusion in the apartment. A female teenager was found hiding in a closet and about eight of the

guests, including appellant Officer DePanicis was later discovered in the unlighted attic of the apartment.

The interior of the apartment was described as "the windows were covered with a dark material, they admitted very little light from the outside. There was a phonograph or record player going; it was fairly loud, there was a laughter of many persons and conversations of many persons heard from outside and inside the building. The furniture in the living room was non-existent. The people were sitting on the floors and pillows—one room contained a bed made of boards which was about three inches off the floor and it had a small foam rubber covering over it. There was one normal bed in the one bedroom and there was a kitchen table in the kitchen. Other than that, there was no furniture in the apartment".

The police proceeded to list the names and ages of all guests which resulted in the following information:

No. of Guests	*Age*	*Female*	*Male*
8	17 years	8	0
16	18 years	12	4
4	19 years	1	3
0	20 years	0	0
5	21 years and over	0	5
33		21	12

The inventory of alcoholic beverages found in the apartment by the police shows that there were 102 empty beer cans and 20 full cans of beer. There were also 5 empty and 4 partially empty bottles of whiskey, wine and other alcoholic beverages. Some of the bottles were found on the tables and others were concealed in the furniture and elsewhere.

A routine investigation of the matter was made and the teenage guests were placed in the custody of their parents.

At headquarters, the Police Chief interrogated both officers and ordered them to submit a report on the incident within 24 hours. Officer Wetherill complied with the order immediately and submitted the following statement:

> ". . . on this date Officer Wetherill had a surprise party for a friend's brithday. The party was at my home. Police came to the house and requested entrance to check the house. I, Officer Wetherill, let the police in and they took everyone in the house to Headquarters. Where the people who were minors were released and those over twenty-one were let go. Officer Wetherill was suspended by the Chief pending investigation of the party. It's signed Officer Jay R. Wetherill."

Officer DePanicis, however, advised the Chief two days after the order was given to him that he would not submit the report on the advice of his attorney. However, he did subsequently submit the following report:

> ". . . On Friday, 3/7/69, Officer DePanicis went to Officer Wetherill's apartment at Bloomfield and Center because this officer had an appointment with a girl to discuss a personal problem. This officer was not engaged in the birthday party held at this address. This officer was in a separate room from where the party was taking place and at no time saw or was aware of any kids under twenty-one years of age having alcoholic beverages in their possession. This officer did notice Officer Wetherill lit and bring a birthday cake from the kitchen to the living room where the party was being held. At which time, they began to sing 'Happy Birthday'. The living room was not visible from the room

where this officer was occupying. Under these circumstances, this officer could not elaborate as to what was going on in the living room except as stated above. At approximately 10:10 p.m., police entered the apartment and took everyone into headquarters. . . ."

Several witnesses appeared on behalf of each Patrolman and stated that they did not observe any other guests drinking alcoholic beverages except those that were over 21 years of age. As to Officer DePanicis' defense that he visited the party for the purpose of conferring with a female guest, age 19, the young lady testified that they were conferring in a side room for about an hour and that they did not join the main stream of the party. It was also elicited from some of the witnesses that none of the male guests, who were 21 years of age or older, were inebriated.

Neither Officer Wetherill or DePanicis choose to take the witness stand in their own behalf. Their counsel indicated that they were not doing so because they were fearful that subsequent criminal proceedings might be brought against them. However, they were advised they could have requested a postponement of this hearing until any criminal charges were disposed of.

Upon a full hearing in this cause, and upon the basis of all the testimony heard and the evidence introduced, the Hearing Commissioner, after careful consideration, makes the following

Findings of Fact

It is undisputed that on March 7, 1969, Officer Wetherill had invited numerous guests to a party at his apartment. The guests included both adults and minors, male and

female. All of the female guests were under 21 years of age. The purpose of the party apparently was a surprise birthday party for a girl friend of Officer Wetherill, who was 18 years of age at the time. In addition to the expected party atmosphere, there were found on the premises 122 beer cans and 9 bottles of whiskey, wine and other alcoholic beverages. Upon the arrival of the police, the host, Officer Wetherill, admitted that the "party had gotten out of hand." The party "Rules" refer to "Booze" a slang term for whiskey. Considering the amount of empty and partially consumed alcoholic beverages, it is inescapable that these teenagers had available to them or expected to and, in fact, did participate in the consumption of the beer and whiskey.

As to Officer DePanicis, in addition to his having knowingly participated in the situation as mentioned herein, he is also guilty of having failed to obey a direct order of his superior considering the filing of a report in the incident in question.

Conclusion

The actions of both Officers in reference to this mattter reveals that neither of them was sensitive to the obligation that they carried as Officers of the Police Department of the Town of Nutley. This is not a judgment of their right to associate freely with persons of their own age or even those who may be minors. However, their right of association does not free them of the obligation to conduct themselves in a proper manner, nor are they free to participate in an activity, particularly, one involving minors where alcoholic beverages are made readily available to these young persons.

The action of both Officers leads to the inescapable conclusion that the action of the appointing authority in dismissing both Officers was, and is in the best interest of the community, the Police Department of the Town of Nutley, and appellants. It is, therefore,

ORDERED

That the appeals of Grimm B. DePanicis and Jay R. Wetherill, Patrolmen, Police Department, Town of Nutley, are denied, and the action of the appointing authority is upheld and affirmed.

Decision rendered by Civil Service Commissioner James H. Dowden.

I hereby certify that the above is a true copy of the original which appears in the official record of the Civil Service Commission.

Mr. DePanicis resides at
124 North Road
Nutley, New Jersey

Mr. Wetherill resides at
291 Bloomfield Avenue
Nutley, New Jersey

JOHN J. FARRELL
Chief Examiner and Secretary
Department of Civil Service